2014 IL App (1st) 121199-U

SECOND DIVISION
January 28, 2014

No. 1-12-1199

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 79 C 4682
	)	
CARL MICHAELS,	)	Honorable
	)	Maura Slattery-Boyle,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Harris and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's second-stage dismissal of defendant's *pro se* postconviction petition is affirmed where defendant failed to rebut the presumption that he received reasonable assistance from his postconviction counsel.

¶ 2 Defendant Carl Michaels appeals an order of the circuit court granting the State's motion to dismiss his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). On appeal, defendant contends the dismissal should be reversed

and his petition remanded for new second-stage proceedings because his appointed postconviction counsel failed to provide reasonable assistance when he did not amend the petition with argument to overcome its untimeliness, did not attach supporting affidavits, evidentiary support, or citations to legal authority, and failed to withdraw after acquiescing to the State's motion to dismiss the petition. We affirm.

¶ 3 On March 31, 1980, defendant pled guilty to murder, armed robbery, and home invasion in connection with the stabbing deaths of Austenna Watson and Clarence Hankton. Defendant was sentenced to concurrent prison terms of 80 years for murder and 60 years each for armed robbery and home invasion. Defendant did not appeal his conviction or sentence.

¶ 4 On February 2, 2010, defendant filed a *pro se* postconviction petition, alleging that (1) his guilty plea was involuntary because the trial judge threatened him with the death penalty if he went to trial and was convicted, and (2) when imposing sentence, the trial court failed to admonish him that three years of mandatory supervised release (MSR) would be added to his sentence.[1] Defendant supported his petition with his affidavit, dated January 29, 2010, averring that in March 1980, his trial judge, Circuit Court Judge Thomas Maloney, called defendant and codefendant Loretta Williams[2] into his chambers without their counsel and threatened to impose the death penalty if they did not plead guilty but instead went to trial and were found guilty. Defendant averred that the judge's threat was witnessed by "myself and co-defendant, Loretta Williams, alone." Defendant's affidavit also stated that when imposing sentence, the trial judge

[1] At the time of defendant's guilty plea, a three-year MSR term for murder and Class X felonies was mandated by Ill. Rev. Stat. 1979, ch. 38, ¶ 1005-8-1(d)(1).

[2] The common law record reveals that codefendant Williams also pled guilty and was sentenced to life imprisonment for murder to run concurrently with terms of 60 years for armed robbery and home invasion. Two other codefendants also pled guilty.

failed to inform him that he would be required to serve a three-year MSR term in addition to his prison sentence, and that he did not learn about the MSR term until he overheard other prison inmates discussing it in November 2009.

¶ 5 Defendant's affidavit stated that he filed a motion in January 2002 to receive his "trial transcripts," that a judge granted his motion, and that he never received his transcripts. The attachments to defendant's petition included a letter defendant sent to the clerk's office in December 1984 requesting his transcript proceedings, as well as documents showing that defendant filed a motion in December 2001 for trial transcripts and common law record and that his motion was allowed on January 25, 2002, by Judge William S. Wood. Defendant also attached an affidavit obtained in 2002 from court reporter supervisor Pamela Taylor stating that Bernard Hartnett, the court reporter assigned to Judge Maloney's court on March 31, 1980, had retired and was in ill health, and that the transcript could not be prepared because Mr. Hartnett's notes could not be read by the court reporter's "notereaders."

¶ 6 On March 26, 2010, the circuit court summarily dismissed defendant's *pro se* petition as frivolous and patently without merit. The written dismissal order referenced only defendant's MSR claim. Noting that defendant's conviction was finalized prior to 2005, the court held that, pursuant to *People v. Morris*, 236 Ill. 2d 345 (2010), the rule announced in *People v. Whitfield*, 217 Ill. 2d 177 (2005), did not apply retroactively to defendant's case on collateral review.

¶ 7 Defendant appealed the dismissal of his *pro se* petition. In a summary order issued by this court on October 18, 2011, we noted the circuit court had failed to address defendant's claim that his guilty plea was coerced by the trial judge's *ex parte* threat to impose the death penalty if defendant went to trial and was found guilty. *People v. Michaels*, 2011 IL App (1st) 101241-U, ¶

3. Consequently, we reversed the circuit court's summary dismissal of defendant's petition and remanded for further consideration as a stage-two proceeding in accord with sections 122-2 through 122-6 of the Act (725 ILCS 5/122-2 to 122-6 (West 2010)). *Id.* at ¶ 8.

¶ 8 Upon remand, the circuit court appointed counsel for defendant. Subsequently, defendant's postconviction counsel filed a certificate pursuant to Supreme Court Rule 651(c) (eff. Dec. 1, 1984) without amendment to the *pro se* petition. The certificate stated that counsel had consulted with defendant by mail and telephone "to ascertain [defendant's] contentions of deprivations of constitutional rights" and had conducted additional investigation, but had not amended the *pro se* petition because it "adequately sets forth the petitioner's claims of deprivation of his constitutional rights." Attached to the certificate were copies of this court's summary order of October 18, 2011, and Pamela Taylor's affidavit that the transcript of the guilty plea was not available. Postconviction counsel represented to the court that he had performed additional investigation and had spoken with codefendant Loretta Williams, but had not obtained an affidavit from her. Counsel spoke with Pamela Taylor, confirming that the transcript of defendant's guilty plea was still unavailable because the court reporter at the time of the plea, though still alive, was suffering from dementia. Counsel also spoke with defendant's trial attorney.

¶ 9 The State filed a motion to dismiss the petition, arguing that: the petition was untimely filed; pursuant to *Morris, Whitfield* was not retroactive to defendant's conviction which was finalized before December 5, 2005; and defendant's claim about the trial judge's alleged threat to impose the death penalty was an unsupported conclusion. On April 11, 2012, the circuit court granted the State's motion to dismiss defendant's petition. The court ruled that defendant's claim relative to the trial judge's death penalty threat was "completely preposterous" and unsupported

by affidavit. The court found it "completely illogical" that a judge would allow two alleged murderers into his chambers, alone and unescorted by sheriffs or security personnel.

¶ 10 On appeal, defendant claims postconviction counsel rendered unreasonable assistance by failing to amend the *pro se* petition with argument to overcome the untimeliness bar, supporting affidavits and evidentiary support, and citations to legal authority, and by failing to withdraw rather than asserting defendant's petition was without merit.

¶ 11 This appeal is from the second stage of the postconviction process, at which stage the circuit court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). Under the Act, appointed counsel may seek leave to file amendments to the petition. 725 ILCS 5/122-5 (West 2010). At this second stage, the State is required to either answer the pleading or move to dismiss. *People v. Morris*, 335 Ill. App. 3d 70, 76 (2002). "In determining whether to grant an evidentiary hearing, all well-pleaded facts in the petition and in accompanying affidavits are taken as true." *People v. Orange*, 195 Ill. 2d 437, 448 (2001). If no constitutional violation is shown, the petition is dismissed. *People v. Tate*, 2012 IL 112214, ¶ 10. The denial of a postconviction petition without an evidentiary hearing is reviewed *de novo*. *People v. Marshall*, 381 Ill. App. 3d 724, 730 (2008). We review the circuit court's judgment, not the reasons cited, and we may affirm on any basis supported by the record if the judgment is correct. *People v. Lee*, 344 Ill. App. 3d 851, 853 (2003).

¶ 12 The right to assistance of counsel at trial is derived from the sixth amendment, but the right to assistance of counsel in collateral postconviction proceedings is a matter of legislative grace. 725 ILCS 5/122-4 (West 2010); *People v. Pinkonsly*, 207 Ill. 2d 555, 567 (2003). A court

of review requires only a reasonable level of assistance by postconviction counsel. *People v. Moore*, 189 Ill. 2d 521, 541 (2000). The level of postconviction counsel's competence is measured by counsel's compliance with Rule 651(c). *People v. McNeal*, 194 Ill. 2d 135, 142-43 (2000). Rule 651(c) requires the record to show that postconviction counsel has: (1) consulted with petitioner to ascertain his contentions of any constitutional rights deprivation; (2) examined the record of the trial proceedings; and (3) made any amendments to the *pro se* petition necessary to adequately present the petitioner's constitutional contentions. *People v. Johnson*, 154 Ill. 2d 227, 238 (1993). Rule 651(c) "does not impose upon post-conviction counsel a legal duty to actively search for sources outside the record that might support general claims raised in a post-conviction petition." *People v. Mendoza*, 402 Ill. App. 3d 808, 817 (2010). Where a Rule 651(c) certificate is filed, the presumption is raised that the postconviction petitioner received the required representation by counsel. *Id.* at 813, citing *People v. Rossi*, 387 Ill. App. 3d 1054, 1060 (2009). It is then the defendant's burden to overcome this presumption by demonstrating that counsel failed to comply substantially with the duties required by the rule. *People v Profit*, 2012 IL App (1st) 101307, ¶ 19. The purpose of Rule 651(c) is to ensure that postconviction counsel "shapes the petitioner's claims into proper legal form and presents those claims to the court." *People v. Perkins*, 229 Ill. 2d 34, 44 (2007). Substantial compliance with the rule is sufficient. *People v. Richardson*, 382 Ill. App. 3d 248, 257 (2008). Whether counsel fulfilled his duties under the rule is reviewed *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007).

¶ 13 Defendant contends that his postconviction counsel provided unreasonable assistance by failing to amend the *pro se* petition to specifically state defendant's lack of culpable negligence in the late filing of his petition and to include any arguments, such as defendant's lack of the transcript of his guilty plea, to demonstrate his lack of culpable negligence. Defendant pled

guilty on March 31, 1980. When he filed his *pro se* petition 30 years later, on February 2, 2010, the Act provided that where no direct appeal was filed, a postconviction petition had to be filed within three years of the date of conviction unless the petitioner alleged facts showing the delay was not due to his culpable negligence. 725 ILCS 5/122-1(c) (West 2010). *People v. Lander*, 215 Ill. 2d 577, 586 (2005). Where a petitioner fails to allege facts demonstrating a lack of culpable negligence, a circuit court's dismissal of the petition during the second stage will be affirmed. *Perkins*, 229 Ill. 2d at 43.

¶ 14 Defendant correctly asserts that Rule 651(c) required amendment of an untimely petition to allege any facts that may establish a lack of culpable negligence in the late filing. *Id.* However, the record does not indicate the existence of any such facts. Defendant's lack of the transcript of his guilty plea was not a viable defense to culpable negligence with respect to either of his claims. As to his claim that the trial judge threatened to impose the death penalty if he and co-defendant Williams did not plead guilty, defendant's affidavit asserted that he and Williams were alone with the judge in chambers. With no court reporter being present in chambers, there would have been no transcript of what the judge told defendant and Williams. Based on the record before us, there was no defense to untimeliness that postconviction counsel could have raised in an amended petition to explain why defendant waited 30 years to bring that claim. With respect to his MSR claim, defendant's statement in his affidavit, that he was not told of MSR at the time of sentencing, must be taken as true; thus, a transcript was not required to raise the claim. Even if we were to accept petitioner's assertion that he was diligent in attempting to obtain the transcript of his 1980 guilty plea (although his petition attachments substantiated only that the first such attempt was in December 1984), this could not justify his failure to file a timely petition. The transcript he sought did not excuse the excessive delay in filing his petition.

People v. Gerow, 388 Ill. App. 3d 524, 531 (2009); see also *People v. Lee*, 292 Ill. App. 3d 941, 943 (1997) (lack of access to trial transcripts not sufficient to carry burden of proving lack of culpable negligence). Moreover, defendant apparently was aware of what the transcript would have confirmed--that he was not advised of the MSR term during sentencing--but he alleged he did not learn of the significance of that omission until November 2009. However, all citizens are charged with knowledge of the law, and one's ignorance of the law or of his legal rights will not excuse a delay in filing a lawsuit. *Lander*, 215 Ill. 2d at 588-89. We conclude that no defense existed to the untimely filing of defendant's *pro se* petition that postconviction counsel could have advanced in an amendment to the petition.

¶ 15 Defendant next argues that his appointed postconviction counsel did not provide a reasonable level of assistance because he failed to recast the *pro se* petition into appropriate legal form by including additional affidavits and evidentiary support, as well as citations to legal authority. Defendant contends it was incumbent upon his counsel to obtain an affidavit from Loretta Williams to support his claim that the trial judge threatened to impose the death penalty if defendant went to trial. With respect to his MSR claim, defendant asserts that counsel should have obtained an affidavit from his trial counsel that MSR was not a term of defendant's plea agreement. Defendant's contention that postconviction counsel should have obtained affidavits from his trial counsel and from Williams is based solely on unsupported speculation that those two individuals in fact would have been able to supply affidavits helpful to defendant. The record establishes that postconviction counsel communicated with both Williams and trial counsel. The fact that no affidavits were filed, together with the representations in postconviction counsel's 651(c) certificate, lead us to reject appellate counsel's unfounded speculation and to infer that, for whatever reason, no affidavits helpful to defendant were

obtainable.

¶ 16 Citing *People v. Greer*, 212 Ill. 2d 192 (2004), defendant contends that if postconviction counsel determined he would be unable to obtain affidavits from Loretta Williams or trial counsel supporting defendant's claims, he was required to withdraw. Defendant also relies on *Greer* in arguing that, by failing to respond orally or in writing to the State's motion to dismiss, postconviction counsel acquiesced in the State's motion and indicated to the court that the petition's claims were frivolous, and consequently counsel should have withdrawn.

¶ 17 When postconviction counsel investigates a *pro se* defendant's postconviction claims and finds they have no merit, counsel has two options. One is to withdraw as counsel pursuant to *Greer*. The other is to stand on the allegations in the *pro se* petition and inform the court of the reason the petition was not amended. *People v. Pace*, 386 Ill. App. 3d 1056, 1062 (2008). In the instant case, counsel chose the latter course of action. In doing so, counsel did not give the court to understand that defendant's petition was meritless. Thus, defendant's reliance on *Greer* is misplaced. In *Greer*, defendant's court-appointed postconviction counsel filed a written motion to withdraw, supported by a legal brief, representing there were no meritorious issues to be raised. Our supreme court held that where defendant's counsel advised the court that the postconviction claims were patently without merit and frivolous, his counsel should be allowed to withdraw. *Id.* at 211-12. Other cases cited by defendant are also distinguishable. In *People v. Shortridge*, 2012 IL App (4^{th}) 100663, the State filed a motion to dismiss the defendant's postconviction petition; defendant's postconviction counsel appeared and stated he was "going to confess the motion to dismiss"; and the court entered an order dismissing defendant's petition. In *People v. Slaughter*, 39 Ill. 2d 278, 280-281 (1968), defendant's *pro se* postconviction petition was incoherent. In responding orally to the State's motion to dismiss the petition, defendant's

court-appointed counsel began, "Just for the record," and then merely parroted defendant's incoherent argument summary. Our supreme court held that defendant did not receive adequate representation.

¶ 18 Here, unlike *Greer*, *Shortridge*, and *Slaughter*, postconviction counsel made no communication to the court to indicate he believed defendant's petition was without merit. Consequently, counsel was not required to withdraw. Counsel's failure to respond to the State's motion to dismiss was not a violation of Rule 651(c), as there was no response he could have made. In fact, ethical obligations prohibit counsel from amending a *pro se* petition if the claims are spurious or frivolous. *Greer*, 212 Ill. 2d at 205. "If amendments to a *pro se* postconviction petition would only further a frivolous or patently nonmeritorious claim, they are not 'necessary' within the meaning of the rule." *Id.*

¶ 19 While defendant's *pro se* petition failed to cite legal authority, the circuit court correctly identified his MSR argument as a claim under *Whitfield*. Defendant contends that postconviction counsel failed to provide a reasonable level of assistance by not amending the *pro se* petition's MSR claim to rely on the United States Supreme Court's decision in *Santobello v. New York*, 404 U.S. 257, 262 (1971), which held that a defendant's right to due process may be violated where the State fails to honor its promises as part of a plea agreement. In the alternative, defendant argues that, even were we to find he was not denied a reasonable level of assistance from postconviction counsel, his MSR claim had merit and should not have been rejected because, independent of *Whitfield*, a substantial showing of a constitutional violation was made under *Santobello*.

¶ 20 As defendant concedes, and the circuit court correctly ruled when it summarily dismissed

the *pro se* petition in the first instance, *Whitfield* should be applied only to cases where the conviction was not final prior to December 20, 2005. *Morris*, 236 Ill. 2d at 366. Defendant's 1980 conviction was finalized long before the December 2005 *Whitfield* decision. Moreover, "[w]here *Whitfield* was the first time the supreme court relied on *Santobello* in the context of MSR, defendant cannot maintain a claim for that remedy without relying on the holding in *Whitfield*. By citing *Santobello*, defendant cannot avoid the effect of its progeny *Whitfield* and its limitation to prospective application under *Morris*." *People v. Demitro*, 406 Ill. App. 3d 954, 957 (2010). Accord, *People v. Hildenstein*, 2012 IL App (5th) 100056, ¶ 19. Defendant acknowledges that this court's decisions in *Demitro* and *Hildenstein*, which we find to be well-reasoned, preclude relief under *Santobello*. We conclude that defendant's MSR claim is without merit and that postconviction counsel was not ineffective for failing to advance an argument based on *Santobello*.

¶ 21 Postconviction counsel's filing of his 651(c) certificate triggered the presumption of compliance with the rule. We conclude that defendant has failed to rebut the presumption that he received reasonable assistance from his postconviction counsel. Further, defendant's *Santobello*-based MSR claim is without merit. Accordingly, we find postconviction counsel provided reasonable assistance, and dismissal of defendant's petition was proper.

¶ 22 For the reasons stated above, we affirm the judgment of the circuit court of Cook County.

¶ 23 Affirmed.